WALLEN v. WALLEN et al.

June 13, 1907.

[57 S. E. 596.]

1. Writ of Error—Review—Finality of Decision.—In proceedings for the probate of a will, the jury found that the instrument purporting to be the will of decedent was not his will, and the court, after motion for a new trial, affirmed the verdict and entered an order in accordance with it, and thereupon the propounder brought a writ of error on bills of exceptions taken during the trial. Held, that the appellate court acquired jurisdiction, the decision of the lower court being final, though it did not make a provision for costs.

2. Same—Harmless Error.—Where, in proceedings for the probate of a will, the contestants relied on want of testamentary capacity and undue influence, and the greatest latitude was allowed the parties, the refusal to require contestants to file a statement of the grounds of contest, as requested by the propounder, was not reversible error.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 3, Appeal and Error, § 4033.]

3. Witnesses—Cross-Examination.—Where, in a proceeding to probate a will, the propounder, the chief beneficiary, was a witness in her own behalf, the allowance of questions on her cross-examination with respect to her desire to hold all the property of the testator, and prevent his children from getting any of it, was prejudicial error.

4. Wills—Probate—Evidence—Admissibility.—In proceedings to probate a will, contested on the ground of testamentary incapacity and undue influence, evidence of the financial condition of the children of testator excluded by the will was admissible.

5. Witnesses—Impeachment—Improper Method.—A female witness cannot be impeached by the testimony of her former husband that he had been divorced from her on the ground of her willful desertion.

6. Wills—Testamentary Capacity—Burden of Proof.—In proceedings to probate a will, contested on the ground of testamentary incapacity, the propounder has the burden of proving testamentary capacity, and when she offers for probate an instrument executed in accordance with the formalities required by the statute regulating the execution of wills, which instrument is wholly in the handwriting of testator, and signed by him, a presumption of testamentary capacity arises, and, until evidence of his unsoundness of mind is given, the presumption remains.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 101-110.]

7. Same—Undue Influence—Burden of Proof.—In proceedings to probate a will, contested on the ground of undue influence, undue influence must be clearly and strictly proved, and cannot be presumed,

and the burden of proof rests on contestants, who must establish it by preponderance of the testimony.

[Ed. Note.—For cases in point, see Cent Dig. vol. 49, Wills, §§ 388-402.]

8. Writ of Error—Instructions—Objections—Review.—An objection to an instruction not embraced in the bill of exceptions cannot be considered on writ of error.

9. Wills—Testamentary Capacity—Undue Influence—Character of Will as Evidence.—The nature and character of a will sought to be probated may be considered as a circumstance along with all other circumstances affecting the testamentary capacity of the testator and the question of undue influence, but the same cannot establish want of testamentary capacity or undue influence.

10. Same—Undue Influence—What Constitutes.—The undue influence which will vitiate a will must amount to force and coercion destroying free agency. It must not be the mere desire of gratifying the wishes of another. There must be proof that the will was obtained by coercion or importunity which could not be resisted; that it was made for the sake of peace, so that the motive was tantamount to force and fear.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 373, 375-387.]

11. Same—Declarations of Testator—Admissibility.—The declarations of a testator, not made contemporaneously with the execution of his will sought to be probated and contested on the ground of testamentary incapacity and undue influence, are relevant to show his feelings and affections towards the natural objects of his bounty and his mental condition as reflecting on his testamentary capacity, but are not admissible to establish the substantive fact of undue influence.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 49, Wills, §§ 415-420.]

Error to Chancery Court of Richmond.

Proceeding by Alice H. Wallen for the probate of the will of James A. Wallen, deceased, in which James H. Wallen and others appeared as contestants. There was an order confirming the verdict of a jury finding that the instrument offered as the will of the testator was not his will, and the propounder brings error. Reversed and remanded for trial de novo.

H. R. & Robt. N. Pollard and *Leake & Carter,* for plaintiff in error.

A. L. Holladay and *C. W. Throckmorton,* for defendants in error.

KEITH, P. A jury was impaneled in the chancery court of the city of Richmond, to determine whether or not a certain paper writing purporting to be the last will and testament of James A.

Wallen, deceased, be the true last will and testament of said James A. Wallen. The jury found that the paper writing, bearing date the 16th day of January, 1904, and offered for probate as the last will and testament of James A. Wallen, deceased, is not the true last will and testament of the said James A. Wallen. Thereupon Alice H. Wallen moved the court to set aside the verdict and grant her a new trial (1) because the verdict was contrary to the law and the evidence, and (2) because of misdirection of the jury; but the court approved the verdict, confirmed the same, and entered an order in accordance with it, and thereupon the case was brought before us upon bills of exceptions taken during the trial.

The defendants in error moved to dismiss the appeal for want of jurisdiction, because:

"First, no final order has been made by the lower court.

"Second, the plaintiff in error did not in terms except to the action of the lower court in refusing to grant a new trial. Her exception to the refusal of the court to set aside the verdict of the jury was insufficient.

"Third, the plaintiff in error did not except to the judgment of the lower court, refusing to admit to probate the paper writing offered by her."

None of these grounds are sufficient to sustain the motion to dismiss, and we do not think them of sufficient consequence to warrant an extended discussion. We are of opinion that the decision of the lower court was final, though it did not make provision for the costs of the suit; and that the exception taken by the plaintiff in error was sufficient to enable her to maintain her writ of error. The motion to dismiss is overruled.

The first error assigned in the petition is to the refusal of the court to require the defendants, before going to trial of the issue, to file a statement of the grounds of their defense, as requested by plaintiff in error.

Without undertaking to state categorically the cases to which the statute relied on does or does not apply, and, granting that there might be conditions on a motion to admit a paper to probate where the court would require a statement of the grounds relied upon by those opposing the probate, we shall content ourselves with observing that in this case the plaintiff in error could have suffered no injury by the refusal of the court. The defendants relied in general upon want of testamentary capacity on the part of James A. Wallen, and undue influence exerted upon him in procuring the execution of the paper offered for probate, and to meet these issues the greatest latitude was allowed the parties interested on both sides of the question.

The second error assigned is set out in plaintiff in error's first bill of exceptions. Alice H. Wallen, the propounder of the will and the

beneficiary under it, was introduced as a witness on her own behalf, and upon cross-examination was asked by counsel for defendants in error the following question: "Do you want to hold on to every particle of property that Mr. Wallen had, and prevent his children from getting a single dollar? A. I would like very much if they have anything to have the privilege of giving it to them. I don't want it wrung out of me against Mr. Wallen's will. Q. Then I understand that you want to hold on to all of his property if you possibly can? A. I think the papers ought to stand as they are." To each of these questions, and the answers thereto, plaintiff, by counsel, objected, on the ground that they were irrelevant to the issue; but the court overruled the objection and allowed answers to be given.

In this we think there was error to the prejudice of plaintiff in error. The evidence did not bear upon any phase of the issues before the jury. It was not relevant to the execution of the paper offered for probate, nor to the issue of undue influence by which it was alleged that its execution had been procured. Its sole effect could have been to prejudice the witness in the opinion of the jury.

The third assignment of error is as to the admission in evidence of declarations of the testator not cotemporaneous with the execution of the will, and we prefer to deal with this subject when we come to the consideration of the instructions given and refused.

The third, fourth, fifth, and sixth bills of exceptions are to the admission of evidence with respect to the pecuniary condition of certain of the defendants.

We think the evidence admissible. A testator might with great propriety omit a child from participation in his bounty upon the ground that his pecuniary condition was such as to render any addition to his wealth unnecessary; and, while we do not mean to say that a testator may not with entire propriety omit a child from participation in his bounty who is in need of assistance, we think the fact is one which may be rightfully considered as a circumstance in determining the validity of the testamentary disposition of property.

The fifth assignment of error is with respect to the testimony of a witness, Gustavus A. Paul, whose wife was a sister of the propounder of the will and had been examined as a witness in behalf of the will. Counsel for contestants were permitted to show by this witness that he had been divorced from his wife on the ground of her willful desertion. This tended to degrade her, and thereby to affect her credibility, and was not a proper mode of impeaching her as a witness. See Uhl *v.* Com., 6 Grat. 706.

The court gave without objection, for the plaintiff, instructions marked A, B, D, F, G, I, and J; and gave for the contestants, without objection on the part of plaintiff in error, instructions 1, 2, 3, 4, 8, 10, 11, 12, and 26.

Instruction C. asked for by plaintiff in error and refused by the court, is as follows: "(a) The court instructs the jury that the burden of proving that James A. Wallen was of sound mind at the time of the execution of the paper writing, herein offered as his last will and testament, rests upon the propounder, Alice H. Wallen; and that it is incumbent upon her to establish that fact by a preponderance of testimony. (b) The court instructs the jury that undue influence, which is a species of fraud, must not be presumed, but must be clearly and strictly proved; and that the burden of such proof rests upon the contestants, J. H. Wallen and others; and that it is incumbent upon them to establish undue influence by a preponderance of testimony."

In lieu of the first branch of this instruction, the court gave instruction No. 5, which is as follows: "The court instructs the jury that the burden of proving the testamentary capacity of the said decedent, James A. Wallen, at the time of the execution of the said paper writing, rests upon the propounder, Alice H. Wallen, and that it is incumbent upon her to establish this fact to their satisfaction by clear proof." And the second clause of the instruction of plaintiff in error was met by the court by giving instruction No. 7: "The court further instructs the jury that undue influence (which is a species of fraud) must not be presumed, but must be clearly and strictly proved, and the burden of proving it rests upon those who allege it; but, if undue influence is proved by evidence, the burden of repelling such undue influence is on the propounder, Alice H. Wallen. In other words, the burden of proof in this case lies upon said propounder to satisfy the jury by evidence that the paper writing propounded is the last will of a free and capable testator."

The first clause of the instruction asked for by plaintiff in error was sufficiently liberal to the defendants. It is true that the propounders of a will have the burden placed upon them of proving the testamentary capacity of the decedent; but when a paper writing is offered to a probate court, and it is shown that the formalities required by the statute in such case made and provided have been complied with, and especially where it appears that the paper is wholly in the hand-writing of and signed by the testator—is in form an holograph will—there is a presumption of testamentary capacity. There is, indeed, a presumption in favor of the sanity of every man until evidence of his unsound mind is introduced, and this presumption applies in all cases, criminal as well as civil.

So it was held in Temple *v.* Temple, 1 Hen. & M. 476, a case

decided just 100 years ago, and never since questioned, that "the circumstances that a writing, exhibited for probate as a last will and testament, was wholly written by the testator himself, is prima facie evidence that he was in his senses and able to make a will at the time of writing the same, so that the onus probandi to repel that presumption lies on those who wish to impugn it"; and "proof that the testator's intellects were greatly impaired by the use of opium and ardent spirits, and that in consequence thereof he was frequently incapable of business, is not sufficient to repel the presumption without proof that such was his condition at the time when the writing was executed."

It is axiomatic in law, and nowhere more firmly held than with us, that fraud, wheresoever and by whomsoever relied upon, is never presumed, but must be clearly proved; and this principle is correctly stated in the first part of instruction 7. It is followed up, however, by the statement that, "if undue influence is proved by evidence, the burden of repelling such undue influence is on the propounder." If the defendants had introduced evidence sufficient to establish undue influence, and no evidence had been introduced to the contrary, the verdict must have been against the will. But that is a very different thing from the burden of proof. That burden is always upon him who alleges fraud. In the case supposed, that burden would have been met and sustained, and, to conclude that instruction with the statement that "the burden of proof in this case lies upon said propounder to satisfy the jury by evidence that the paper writing propounded is the last will of a free and capable testator," makes the instruction, taken as a whole, misleading and erroneous, because it leaves upon the propounder the burden of disproving the exercise of undue influence in procuring the execution of the will.

We are of opinion that the court should have given instruction C in both of its branches, as asked for by plaintiff in error, and that, as applied to the facts of this case, it presents the law in terms as favorable as contestants could have expected.

There was, perhaps, no occasion to give instruction 26, as the proposition presented in it is sufficiently covered by other instructions; but it is not embraced in the bills of exceptions, and the objection to it made in the petition cannot be considered.

Instruction 16 is to the following effect: "The jury must consider the nature and character of the will, and, if they find from the evidence that it is contrary to natural justice, they shall give this fact such consideration as they may deem proper in determining the question of the testator's capacity." In other words, if the jury should be of opinion that natural justice required that the testator should not have made his wife the sole legatee, but that his children should have participated in the distribution of the estate, they were at liberty for that cause alone

to declare the testator wanting in testamentary capacity and to hold his last will and testament a nullity, which would be to say that the jury were at liberty to make a will in accordance with their ideas of natural justice.

The nature and character of a will may be considered as a circumstance along with all other circumstances affecting the testamentary capacity of the testator and the question of undue influence, but cannot of itself be sufficient to establish the want of testamentary capacity, or that the testator in the execution of his will was controlled by undue influence. The instruction, indeed, is plainly at war with other instructions given to the jury. See instructions G and J, among others.

What has been said with reference to instruction 16 applies also to instruction 30.

Instruction E, asked for by plaintiff in error and refused by the court, is as follows: "The court instructs the jury that the influence which will vitiate a will must amount to force and coercion, destroying free agency. It must not be the mere desire of gratifying the wishes of another. That would be a very strong ground in favor of the testamentary act. Further, there must be proof that the act was obtained by coercion or importunity which could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear."

That instruction is supported by 1 Williams on Ex'rs, p. 39, and 1 Johns. on Wills, p. 29, was approved in Parramore *v.* Taylor, 11 Gratt. 220, 239, a case of the highest authority, and it was error to refuse it.

This brings us to the consideration of instruction H, which was refused by the court. The court was asked to instruct the jury "that, while declarations of a testator not contemporaneously made with the execution of a will are relevant evidence to show the feeling or affection of a testator towards the natural beneficiaries of his bounty, yet they are not admissible to establish the substantive fact of undue influence."

This presents for consideration an interesting question which may affect several other instructions given, and we shall endeavor to state our views so as to settle the law upon the subject, without referring to each particular instruction, and thus prolonging an already lengthy opinion.

The declarations of a testator, although not made contemporaneously with the execution of the will, are admissible not only as showing his feeling or affection towards the natural beneficiaries of his bounty, as stated in the instruction, but are also relevant to show his mental condition with respect to his testamentary capacity, but are not admissible to establish the substantive fact of undue influence.

In 29 Am. & Eng. Ency. L. 117, it is stated that: "Declara-

tions of a testator contemporaneous with the execution of the will are admissible as part of the res gestæ for the purpose of showing the existence of undue influence; but declarations of a testator not contemporaneous with the execution of the will are generally held not admissible to establish the substantive fact of undue influence since they are mere hearsay evidence, which, by reason of the death of the testator can never be explained or contradicted by him."

In Jackson *v.* Kniffen, 2 Johns. (N. Y.) 33, 3 Am. Dec. 390, the opinion, delivered by Judge Thompson, and concurred in by Chief Justice Kent and Justice Livingston, says: "This will might have been executed under circumstances which ought to invalidate it, but to allow it to be impeached by parol declarations of the testator himself would, in my judgment, be eluding the statute, and an infringement upon well settled and established principles of law." And Judge Livingston, delivering a separate opinion, uses the following language: "I concur in the opinion just delivered, though, on the first reading of this case, my impressions were that the testator's declarations, made in the moment of expected dissolution, should have been received to establish the duress under which he acted. On more mature reflection, I am satisfied that they were properly rejected. Besides, the danger of tampering with a person who may be known to have made his will, of fraud, in making use of some loose and unguarded expression to set it aside, and of perjury, in fabricating declarations which may never have been made, and thus revoking a will by parol, the right of cross-examining is invaluable, and not to be broken in upon."

In Stevens *v.* Vancleve, 4 Wash. C. C. 262, Fed. Cas. No. 13,412, Mr. Justice Washington states the law as follows: "The declarations of a party to a deed or will, whether prior or subsequent to its execution, are nothing more than hearsay evidence; and nothing could be more dangerous than the admission of it, either to control the construction of the instrument, or to support or destroy its validity. If the evidence is offered in support of the instrument, it could only have that effect upon the supposition of a uniform consistency of those declarations, not only with the instrument itself, but with the secret intentions of the party, at all times after those declarations were made; and yet how unsafe a criterion would this be, when most men will acknowledge the frequent changes of their intentions respecting the disposition of their property by will before they have committed them to writing. The uniform consistency of those declarations is the chief ground upon which the whole argument in favor of the evidence is rested; and yet, if the evidence be admitted at all, the plaintiffs would be at full liberty to prove opposing declarations of the testator at other times, and thus a door would be

open to an inquiry in no respect pertinent to the main subject of investigation, but michievously calculated to perplex and to mislead the jury. That such evidence has sometimes been given is proved by many of the cases read by the defendant's counsel; but it would be very unsafe to consider those instances as laying down a rule of law, since, in none of them, was an objection made to the admission of the evidence, so as to submit its competency to judicial inquiry and decisions. The general rule of law is against the evidence, and no case has been cited showing an exception to it, unless when it was offered to repel a charge of fraud or circumvention of the devisee in obtaining the will."

In Waterman *v.* Whitney, 11 N. Y. 157, 62 Am. Dec. 71, the syllabus states that where the will is resisted on the ground that the testator was not of sound mind, or that it was procured by undue influence, which involves his mental condition at the time it was executed, his subsequent statements touching the disposition of his property, and inconsistent with the will, in connection with other evidence tending to prove a want of mental capacity, are competent; that on these issues his declarations made before the will was executed, are evidence under the same restrictions and for the same purpose; that such prior or subsequent declarations are competent evidence on these questions only as tending to prove the testator's mental condition when the will was executed, but when from the remote period at which the declarations were made, or other cause, they do not legitimately bear upon the state of the testator's mind when the will was made, they should be excluded. These conclusions were reached after an examination of a great many English and American cases. The principle established seems to be that the declarations of the testator are admissible to show his mental condition or capacity, as well as his feelings or affections, but are inadmissible as proof of the substantive fact of undue influence.

The very recent case of Throckmorton *v.* Holt, 180 U. S. 552, 21 Sup. Ct. 474, 45 L. Ed. 663, contains a full review of the authorities bearing upon the subject. The court said:

"After much reflection upon the subject, we are inclined to the opinion that not only is the weight of authority with the cases which exclude the evidence both before and after the execution, but the principles upon which our law of evidence is founded necessitate that exclusion. The declarations are purely hearsay, being merely unsworn declarations, and, when no part of the res gestæ, are not within any of the recognized exceptions admitting evidence of that kind. Although in some of the cases the remark is made that declarations are admissible which tend to show the state of the affections of the deceased as a mental condition, yet they are generally stated in cases where the mental capacity of the deceased is the subject of the inquiry, and in those

cases his declarations on that subject are just as likely to aid in answering the question as to mental capacity as those upon any other subject. But if the matter in issue be not the mental capacity of the deceased, then such unsworn declarations, as indicative of the state of his affections, are no more admissible than would be his unsworn declarations as to any other fact.

"When they are not part of the res gestæ, declarations of this nature are excluded because they are unsworn, being hearsay only; and, where they are claimed to be admissible on the ground that they are said to indicate the condition of mind of the deceased with regard to his affections, they are still unsworn declarations, and they cannot be admitted if other unsworn declarations are excluded. In other words, there is no ground for an exception in favor of the admissibility of declarations of a deceased person as to the state of his affections, when the mental or testamentary capacity of the deceased is not in issue. When such an issue is made, it is one which relates to a state of mind which was involuntary, and over which the deceased had not the control of the same individual, and his declarations are admitted, not as any evidence of their truth, but only because he made them, and that is an original fact from which, among others, light is sought to be reflected upon the main issue of testamentary capacity. The truth or falsity of such declarations is not important upon such an issue (unless that for the purpose of showing delusion it may be necessary to give evidence of their falsity), but the mere fact that they were uttered may be most material evidence upon that issue. The declarations of a sane man are under his control, and they may or may not reflect his true feelings; while the utterances of the man whose mind is impaired from disease or old age are not the result of reflection and judgment, but spontaneous outpourings arising from mental weakness or derangement. The difference between the two, both as to the manner and subject of the declarations, might be obvious. It is quite apparent, therefore, that declarations of the deceased are properly received upon the question of his state of mind, whether mentally strong and capable, or weak and incapable, and that from all the testimony, including his declarations, his mental capacity can probably be determined with considerable accuracy. Whether the utterances are true or false cannot be determined from their mere statement, and they are without value as proof of their truth, whether made by the sane or insane, because they are in either case unsworn declarations."

In Shailer *v.* Bumstead, 99 Mass. 112, it is said: "Intention, purpose, mental peculiarity, and condition are mainly ascertainable through the medium afforded by the power of language. Statements and declarations, when the state of the mind is the fact

to be shown, are therefore received as mental acts or conduct. The truth or falsity of the statement is of no consequence."

In Gibson *v.* Gibson, 24 Mo. 227, it is said that declarations of the testator were admitted when it was proposed to show the condition of the testator's mind, or to show the state of his affections, but never as a mere narrative of facts.

We are of opinion, therefore, that declarations of the testator not made contemporaneously with the execution of his will are relevant evidence to show his feelings and affections towards the natural objects of his bounty, his mental condition as reflecting upon his testamentary capacity, but are not admissible to establish the substantive fact of undue influence.

There are many other instructions to which objection was taken. Some of them are unnecessary, as being merely iterations of propositions of law already sufficiently presented. Some of them are objectionable as giving undue prominence to particular facts. But we think we have said enough to indicate our view of the law.

We again call attention to what this court has said on more than one occasion—the danger of multiplying instructions. Every instruction unnecessarily given increases the chances of a reversal. More than 40 instructions were offered in this case, when, as it seems to us, a few elementary principles of law thoroughly established by the decisions of this court would have been sufficient to guide the jury to a correct conclusion.

We are of opinion that the order of the chancery court should be reversed, the verdict set aside, and the case remanded for a trial de novo.

Reversed.

Note.

Though this case may not have involved as large an amount of money as the Dangerfield Case, 5 Va. Law Reg. 149, yet it bristles with many points of interest, and the array of counsel on both sides is a guaranty that the questions raised were ably argued and thoroughly threshed out. It is difficult to see why the lower court refused to give instruction E asked for by the plaintiff in error. This instruction taken from Parramore *v.* Taylor, 11 Gratt. 220, was approved in Carter *v.* Carter, 82 Va. 641; Orr *v.* Pennington, 93 Va. 273.

A very interesting question relating to undue influence on testators, which has never been dealt with by our court, is the following taken from "The Law" discussing the effect of spiritualism on testamentary capacity:

A recent case decided by the Supreme Court of Indiana discusses very interestingly whether revelations arising out of belief in spiritualism are such undue influences as to make void a will. See Steinkueller *v.* Wampner, 81 Northeastern Rep. 482. A great many cases are cited in the opinion and some of them discussed. The facts show that testatrix was a firm believer in spiritualism, and that upon the night before the will was executed, and again the next morning, she

said her deceased husband had told her that her orphan grandchildren would cause her a great deal of trouble and she should make a will giving each of them one dollar. Her daughter, to whom the property was left, told her in effect to do what her husband advised. The recital of facts is very meager. It is stated testatrix often attended seances and accepted those communications purporting to come from her husband and other deceased relatives as realities. It is not stated she was in any sense easily influenced or that the beneficiary under the will exercised any particular influence over her or had resorted to any trick or device to palm off spurious revelations.

Therefore this appears to be one of the many cases on this line where the question of the effect of such revelations in and of themselves bringing about testamentary disposition is involved.

The case recognizes what is the great weight, if not the concensus, of authority, that mere belief in spiritualism is not the incompetency that would prevent the making of a valid will. Thus the court says: "A mere belief in spiritualism may be harmless and of no concern to any one other than its possessor, but occult 'revelations' cannot be permitted to control the practical affairs of this world, and the belief upon this subject and consequent conduct of the testatrix was particularly relevant upon the question of undue influence." A case of this character is interesting in view of the later history of this country showing how wealth has been piled up through the efforts of such religious enthusiasts or charlatans, as they may accordingly be believed to be, such as Elijah A. Dowie and Mary Baker G. Eddy, to say nothing of absent cures pretended to be effected for so much money per head.

One of the most noted cases in this country of a successful attack on a will as the product of what were found to be pretended revelations from the spirit land was that of Orchardson *v.* Cofield, 171 Ill. 14, 49 N. E. 197, 63 Am. St. Rep. 211, 40 L. R. A. 256. But that case treated the communications as mere instrumentalities in the hands of a beneficiary, trumped up to deceive a weak minded old woman, whom that beneficiary married in order to effectuate his purpose. It, therefore, would not appear to be so much a conclusion resting on the square proposition as to whether a message, not shown to be the product of fraud or gotten up by designing person for his benefit, may invalidate a will, if believed in and acted on, as the sole reason of a device, would make the will invalid.

This case, perhaps does not go to that extent, but the case is reversed and remanded for the jury to weigh this matter "in connection with other evidence upon the subject of testamentary incapacity."

Courts do recognize that religious belief is a sound reason for disposition of property. So it may advance that belief, if, at least, no propagation of what the law deems immorality is involved, where a testator provides for such by his will.

It would seem to be true, therefore, that a devise to promote belief in spiritualism as a cult would be valid. If so, why may it not be true that its occult "revelations" may not legitimately influence testamentary disposition? If "it is entirely legitimate and proper for the wife to seek the advice of her living husband and after death pay some regard to his known wishes in the preparation of her will," can it be said as a legal proposition, that while belief in spiritualism is no proof of incompetency yet belief in its revelations and being guided by them, to an extent, makes a will, necessarily, the product of an insane delusion.

In a Wisconsin case a will was attacked because the testator was

a spiritualist, but it was held valid, principally, upon the theory that while the testator believed in the reality of the revelations, he followed the advice they contained as or not they coincided with his own judgment. See In re Smith's Will, 52 Wis. 643, 8 N. W. 616, 38 Am. Rep. 656.

The conclusion from that case seems to be, that if the testator considers the disembodied spirit as establishing its identity and having the gift of precision and generally of greatly superior intellect to one in the flesh, and for these reasons its revelations ought in conscience to be obeyed, then there would be an insane delusion which would invalidate a will.

In our view it is more logical to regard belief in spiritualism, as was said by Vice-Chancellor Gifford in Lyon *v.* Home L. R. (6 Eq.), 655, as "mischievous nonsense, well calculated, on the one hand to delude the vain, the weak, the foolish and the superstitious, and on the other to assist the projects of the needy and of the adventurer," and that where there is disposition of property, unusual and contrary to the ordinary claims of kinship, as by the accepted standards is recognized, mere belief in spiritualism should make a prima facie case of intestacy."—The Law.

LYNCHBURGH TRACTION & LIGHT CO. *v.* GUILL.

June 13, 1907.

[57 S. E. Rep.]

1. Street Railroads—Injuries to Travelers—Negligence—Pleading.—A complaint against a street railroad company for injuries to a traveler, alleging that defendant so carelessly, etc., managed its cars that by reason of its negligence one of them ran against plaintiff, who was then on the highway, whereupon, etc., was fatally defective for failure to allege the facts from which the negligence arose.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 44, Street Railways, § 224; vol. 37, Negligence, §§ 182-184.]

2. Same—Public Highway—Establishment.—Where plaintiff was injured in a collision with a street car in a highway outside the limits of a city, whether the place where the injury occurred was in fact a public highway must be determined by the law with reference to the establishment of public roads in the country, and not with respect to the dedication and opening of streets in a city.

3. Dedication—Acceptance.—The acceptance of the dedication of a city street may be shown by the acts of the municipality's officers.

[Ed. Note.—For cases in point, see Cent. Dig. vol. 15, Dedication, §§ 70, 83.]

4. Same—Country Highways.—The acceptance of a highway in the country, so as to impose on the public the burden of keeping it in order, must appear by matter of record, either by a formal acceptance or a showing that the county court has laid off a road before used